IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 278 of 1988
WITH
CIVIL APPLICATION No. 6707 of 2002
WITH
CIVIL APPLICATION No. 6723 of 2002
WITH
CIVIL APPLICATION No. 6736 of 2002
WITH
CIVIL APPLICATION No. 7170 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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BHARTIBEN PARESHKUMAR MEHTA & D/O JANAKRAI MANILAL
Versus
PARESHKUMAR SATISHKUMAR MEHTA

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Appearance:
1. First Appeal No. 278 of 1988
MS MAYA S DESAI for Petitioner No. 1
MR MANISH R BHATT for Respondent No. 1

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CORAM : MR.JUSTICE D.A.MEHTA

Date of decision: 18/06/2003

CAV JUDGEMENT

1 This appeal is filed against the judgment and order dated 7/12/1987 delivered by Court No.9, City Civil Court, Ahmedabad in Hindu Marriage Petition No.288 of 1985. The marriage petition was filed by the husband (respondent herein) and the present appellant, viz., wife was the respondent in the marriage petition. For the sake of convenience, hereafter the parties shall be referred to as 'petitioner' and 'respondent' respectively as described in Hindu Marriage Petition.

2 On 2/2/1975 the petitioner and the respondent got married according to Hindu religious rites. Thereafter, they cohabited together as husband and wife at Ahmedabad and as a result of such cohabitation the respondent gave birth to a Son on 11/12/1975. The petitioner-husband preferred the petition against the respondent-wife seeking decree of divorce on the grounds of cruelty and desertion as provided in Section 13 of Hindu Marriage Act,1955 (The Act).

3 The case of the petitioner is that the respondent was short tempered in nature, insulted the parents of the petitioner, misbehaved with the petitioner and his parents by picking up quarrels on small trivial household matters. It is the say of the petitioner that these problems commenced right after the marriage was solmenized but the petitioner, on the assumption that these are usual problems at the commencement of married life, thought that passage of time would permit the things to settle down and the respondent would adjust in the new setup. However, the nature and the conduct of the respondent did not change, but she insisted for separation of the petitioner and his parents as a precondition to stay together. As the petitioner, being the only child of his parents, was not amenable to the said demand of the respondent, the relations between the spouses worsened.

4 The case putforth by the respondent wife is that the differences between the spouses were essentially due to the behaviour of the petitioner and the respondent-wife could not be blamed. That the petitioner did not take care of her; nor did he protect her from the illconduct of the parents of the petitioner. That the parents of the petitioner used to pick up quarrels with her and did not want her to reside in the marital home. That she had tried to pull on despite being insulted by the parents. That, there used to be the quarrels between her and her mother-in-law in relation to feeding of her

son as well as in relation to other households chores to be attended to. She has denied all the averments made in the petition and stated that there was no cause of action which would entitle the petitioner to seek the decree of divorce.

5 The Trial Court framed the following issues and answered them respectively as recorded in para 4 of the impugned judgment.

"1 Whether the petitioner proves that the respondent wife has after solemnization of the marriage deserted him for a period of two years and upwards prior to presentation of the petition and hence he is entitled to the relief claimed?

2 Whether the petitioner proves that the respondent wife has after solemnization of the marriage, treated him cruelly which entitles him to the relief claimed?

3 Whether there is any legal impediment in granting the relief prayed for under Sec.23 of the Hindu Marriage Act,1955?

4 Whether the petitioner proves that he is entitled to the custody of the minor child ?

5 What order and decree ?

My findings on the above Issues, for the

reasons recorded hereinafter are as under :

Issue No.1 : In the affirmative.
Issue No.2 : In the affirmative.
Issue No.3 : In the negative.
Issue No.4 : In the negative.
Issue No.5 : As per the final order".

6 Ms.Maya Desai, learned Advocate appearing on behalf of the respondent wife stated that the Trial Court has erred in granting decree of divorce on the grounds of cruelty and desertion.

6.1 That if the incidents which are complained of by both the parties are taken into consideration they are relatable only to normal wear and tear of matrimonial life and at the highest it could only be stated that there was mal-adjustment between the spouses.

6.2 That, the Trial Court did not try to find out as to who was at fault and what was the cause for rupture of the matrimonial life.

6.3 That the entire judgment of the Trial Court shows that no question was put to the petitioner husband as regards the cause of rupture.

6.4 That no efforts were made by the Trial Court for reconciliation and the entire appreciation of evidence by the Trial Court was incorrect and wrong.

6.5 That the respondent wife was compelled to desert matrimonial home eventhough she had no intention to desert.

6.6 That the Trial Court had failed to ascertain as to whether desertion was without reasonable cause or not.

6.7 That neither of the ingredients of Section 13(1)(ib) of the Act had been found to be satisfied.

6.8 That regardless of whether reasonable cause was pleaded by the respondent or not, regardless of whether evidence in this direction had been led or not, Court ought to have presumed the existence of reasonable cause on the basis of facts and evidence on record.

6.9 It was therefore submitted that the impugned judgment and order were bad in law and the same be quashed and set aside and the appeal be allowed.

7 As against this, Mr.M.R.Bhatt, learned Advocate appearing on behalf of the petitioner contended that there was no error either in law or on facts, committed by the Trial Court which would require this Court to interfere with the impugned judgment and order.

7.1 That apart from the evidence of the petitioner, the respondent, as well as their respective fathers, there was evidence in the form of deposition of two

outsiders, viz. (i) Premlattaben (Exh.35) who was neighbour of the petitioner and (ii) one Dineshbhai (Exh.27) a friend of the petitioner.

7.2. It was stated that the deposition of Dineshbhai categorically pointed out the misbehaviour of the respondent, with special reference to the trip undertaken by Dineshbhai and his wife together with the petitioner and the respondent. That both the couples were together for a period of 22 days and the said deposition had rightly been taken into consideration by the Trial Court for ascertaining as to who was at fault.

7.3 It was further submitted that the law in relation to burden of proof in such proceedings was that the petitioner was required to establish cruelty and/or desertion on the basis of preponderance of probability and not beyond reasonable doubt. That the petitioner had been able to do so successfully as could be seen from the evidence on record.

7.4 It was next contended that the concept of cruelty had to be appreciated in the context of the facts and that even a single instance was sufficient to prove the charge and in the present case the Trial Court had after appreciating the evidence on record concluded that charge was proved.

7.5 That similar finding had been recorded by the Trial Court in relation to desertion by the respondent wife.

8 Section 13 of the Act pertains to divorce and the grounds on which divorce may be granted have been set out. Clause (ib) of sub-section (i) of Section 13 states that the other party to the petition has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. Explanation states that in this sub-section the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly. Thus, the basic requirement is that the other party has forsaken and abandoned the petitioner without reasonable cause and without the consent or against the wish of the petitioner. Essentially the ingredients are the factum of separation and the intention to bring cohabitation permanently to an

end. The Explanation widens the definition of desertion to include wilful neglect of the petitioning spouse by the other party. At the same time, such desertion viz.permanent forsaking and abandonment or wilful neglect has to be without reasonable cause, without the consent or against the wish of the petitioner. Therefore, it would become incumbent on the petitioner to prove desertion and also that such desertion was without reasonable cause throughout the statutory period of not less than two years immediately preceding the presentation of the petition.

9 In the case of Lachman Utamchand Kirpalani Vs. Meena alias Mota, (AIR 1964 SC 40), the Supreme Court held that the desertion was without cause and stressed the importance of avoiding the fallacy which lies in a failure to distinguish between a legal burden of proof which rests on the petitioner and a provisional burden raised by the state of evidence which may shift from one party to another. The legal burden throughout the case is on the petitioner to prove that the wife (for instance where the husband is the petitioner) deserted him without any cause. To discharge that burden he may rely on the fact that he asked her to join him and she refused. Once he proves that fact of refusal she may seek to rebut the inference of desertion by providing that she had just cause for her refusal. The standard of proof in case of all proceedings under the Act is that the Court must be satisfied on a preponderance of probability that the ground for relief is proved and normally the Court requires that the evidence of a spouse who charges the other spouse with a matrimonial offence should be corroborated".

9.1 In the case of Ramani Vs. Saraswathi (2000) 10 SCC 458, the Apex Court has stated that :

> "The question whether the wife was guilty of desertion or not is essentially a question of fact".

10 The petitioning spouse who avers desertion on the part of the other party to the marriage is required to prove the basic ingredients of desertion. However, if the other party to the marriage raises by way of defence, an existence of a reasonable cause, it is for that other party to plead and establish the same. In the case of Chetan Dass Vs. Kamla Devi, (AIR 2001 SC 1709), the

Court held that the petitioning husband was not entitled to decree of divorce. The respondent wife in the said case, had in reply, alleged adultery against the petitioning husband and the Court found that the said allegation of adulterous conduct of the petitioning husband was established. The Court therefore held that the defence of the wife for having a justified reason to live away from the husband was correct and the husband could not be given advantage of his own wrong and be granted a decree of divorce on the ground of desertion on part of the wife. Therefore, once a party pleads a particular defence it is for that party to lead evidence in that regard and establish the same.

11 Clause (ia) of sub-section (i) of Section 13 of the Act states cruelty as a ground on which the marriage can be dissolved by a decree of divorce. The said provision has been explained by the Supreme Court in the case of Parveen Mehta Vs. Inderjit Mehta (2005 [5] SCALE 165) in the following words :

"19. Clause(ia) of sub-Section (1) of Section 13 of the Act is comprehensive enough to include cases of physical as also mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of his matrimonial offence. That doctrine is now repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty. Thus, mental cruelty has to be established from the facts.(Mulla Hindu Law, 17th Edition, Volume II, page 91)".

xxxxx xxxxx xxxxx xxxxx

"21. Cruelty for the purpose of Section 13(1)(ia) is to be taken as a behaviour by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioral

> pattern by the other. Unlike the case of physical cruelty the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other".

12 Cruelty can therefore be said to be an act committed with an intention to cause suffering to the opposite party. Cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence. It may be taken as equally well established that it is a wrong approach to put the various acts or conduct alleged into a series of separate compartments and say of each of them that by themselves they cannot pass the test of cruelty and, therefore, that the totality cannot pass that test. There may be cases where the acts complained of are in themselves so trivial that the court would be justified in not attaching any importance to them. On the other hand, acts not serious in themselves may be symptomatic of the pass to which the marriage had come and of the state of the minds of the parties. Since cruelty is to be inferred from the whole relations between the husband and the wife it would not be a proper approach 'to take up each alleged incident one by one and hold that it is not hurtful or cruel and than to say that cumulatively they do not amount to anything grave, weighty or serious. The relationship of marriage in the present context is not to be taken as just the sum of the number of incidents. The primary question in these cases is not a question whether the conduct complained of would be cruel to a reasonable

person. The Court has not to deal with an ideal husband or ideal wife but with 'this man and this woman'. The Court will not start with any a priori assumptions that the parties are reasonable people.

13 In the case of Dr.N.G.Dastane Vs. Mrs.S.Dastane (AIR 1975 S.C.1534) the Apex Court while laying down principles regarding condonation of cruelty stated that condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. It is further stated that the evidence of condonation consists in the fact that the spouses led a normal sexual life despite the respondent's acts of cruelty by the offending spouse. That sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment. Therefore, the evidence showing that the spouse permitted restitution of conjugal rights even after a series of acts of cruelty would be proof that the other spouse condoned the cruelty. However, that by itself is not sufficient and not the only necessary ingredient of condonation, and the same has to be appreciated with other evidence.

14 In the present case cruelty is alleged by the petitioner as having been caused by the respondent. The respondent made a counter allegation of cruelty at the hands of the petitioner and/or the members of the family of the petitioner. The Trial Court has come to the conclusion that on the contrary, it is the respondent who because of her behaviour, has caused cruelty to the petitioner. It is further held by by the Trial Court that "in my opinion, analysing the evidence adduced, it is the respondent who has acted very irrationally and has ultimately without any reasonable cause left the matrimonial home". Thereafter, the Trial Court has further found from the deposition of the witnesses that the counter allegation made by the respondent wife of being treated cruelly by the husband and/or his family members is not proved because no evidence in this regard has been led on behalf of the respondent, while on the other hand the petitioner had examined one neighbour viz.Premlattaben and also his friend Dineshbhai who have corroborated the petitioner's allegation about the behaviour of the respondent.

15 In relation to submission on behalf of the respondent that even if cruelty having been caused by the respondent was proved by the petitioner, the same must be deemed to have been condoned by the petitioner because of

revival of cohabitation between the parties and hence decree for divorce should not be passed, the Court has found that even if such condonation is presumed, the factum of desertion viz. leaving matrimonial home in November,1983 without having any reason so to do and leaving without consent of the petitioner and not returning to the matrimonial home or resuming cohabitation till filing of the petition would go to show that there was no reasonable cause and the respondent had deserted within the meaning of provisions of Section 13(1)(ib) of the Act.

16 The Trial Court has taken into consideration the evidence led by both the sides. On the one hand the deposition of the petitioner (Exh.16), deposition of Dineshkumar Somabhai Patel (Exh.27), deposition of Premlattaben Shantilal Mehta (Exh.35) and deposition of Satishchandra Mohanlal Mehta (Exh.40), and on the other hand on behalf of the respondent, deposition of the respondent wife (Exh.42) and deposition of Janakray Manilal Pandit (Exh.46) have been taken into consideration, apart from the other documentary evidence, letters, correspondence etc.

17 It is not necessary for this Court to reappreciate the entire evidence, however, to ensure that Trial Court has arrived at a just and fair conclusion some of the depositions have been taken into consideration. The approach of the Trial Court is not shown to be perverse : no relevant evidence has been ignored; no irrelevant evidence has been considered.

18 The petitioner has deposed that the respondent wife was not only rude in her behaviour but employed language which was offending in nature and insulted the elders of the family. In this context, it is stated that this conduct was not understood initially by the petitioner and the petitioner felt that these were incidents of mal- adjustment in the initial days of matrimonial life which would smoothen out by the passage of time. However, it is further deposed that respondent had thereafter stated that she did not wish to stay with the parents of the petitioner and the petitioner used to keep on explaining that he being the only child of his parents and the parents being aged it was not possible to set up a separate unit. It is further averred that the respondent wife declared that unless the petitioner is separated from his family she would not permit conjugal rights to the husband resulting in mental stress and frustration so far as the petitioner was concerned and as a consequence even his work suffered in the bank where he

was serving. That the respondent went to her parents' place in September,1975 as she was carrying and ultimately delivered a baby boy on 11.12.1975. That in 1976 the petitioner's mother along with lady residing in neighbourhood went to Rajkot to fetch the respondent and her son but after staying at matrimonial home for a period of 20 days or so she was sent to her father's place due to her illhealth. Thereafter the respondent returned on 20/7/1976, but there was no change in her behaviour and she remained not only rude to the in-laws but also towards guests who would visit to see the newly born child. Thereafter, in or around February,1997 father of the respondent was transferred from Rajkot to Ahmedabad and the respondent without informing anyone left the matrimonial home with the child and went to her father's place in Naroda, Ahmedabad. Thereafter, it is averred that the petitioner went and brought her back.

18.1 It is further stated, in March,1977 the petitioner and the respondent along with Dineshkumar and his wife went for a trip to Kashmir for a period of 22 days. It is the say of the petitioner that during the entire trip the respondent not only did not enjoy the trip but did not permit the petitioner also to enjoy and stayed aloof from the petitioner. That the friend of the petitioner Dinesh Patel and his wife tried to patch up the differences between the petitioner and the respondent but there was no change in the behaviour of the respondent. This averment of the petitioner is corroborated by the deposition of Dinesh at Exh.27.

18.2 The petitioner has further deposed that in May,1977 the petitioner left matrimonial home. That in August,1977 after sending 3 or 4 messages, the respondent agreed to meet the petitioner. That when they met, the respondent stated that she had joined the course of librarian and that she would not return to the matrimonial home unless the petitioner was ready and willing to set up a separate dwelling unit.

18.3 The petitioner has further stated that in February 1978 there was "Vastupooja" of their new residential premises, being Tapovan bungalow in Ambawadi area, and for this purpose mother of the petitioner went to fetch the respondent. The respondent came to the matrimonial home, attended the "Pooja" and after two days again left the matrimonial home.

18.4 The petitioner has further deposed that once again in December,1978 he alongwith his mother went and brought the respondent and the child. That though the

respondent stayed in the matrimonial home, there was no physical relationship between the two. In other words, according to the petitioner though they were staying under the same roof there was no cohabitation and the same resulted in mental torture so far as petitioner was concerned. That this situation continued right upto 3/2/1980.

18.5 The petitioner deposes that on 3/2/1980 a quarrel took place and on 4/2/1980 the respondent left the matrimonial home. Thereafter, it appears that there was some exchange of words on the evening of 4/2/1980 between the relatives of the respondent on one side and the petitioner and his parents on the other side. On 23/2/1980 the respondent filed a complaint against the petitioner before Jyotisangh, a social organization (an NGO). The efforts made by Jyotisangh did not result in any improvement in the situation and the respondent continued to remain away from the matrimonial home.

18.6 In the month of May,1983 the petitioner tried to compromise with the respondent through his friend Dineshbhai but the said effort was not fruitful. In October,1983 the father-in-law of the respondent went to call the respondent and invited her back in the matrimonial home stating that as both the parents of the petitioner were proceeding on pilgrimage only the husband and wife would be staying together. Accordingly, the respondent came back to matrimonial home in October,1983 but without child, who was stated to have gone for a trip with the parents of the respondent.

18.7 It is further stated by the petitioner that the petitioner and the respondent wife stayed under one roof till November,1983, but there was no cohabitation between them. In other words, it is deposed by the petitioner that they never stayed as husband and wife and there was no restitution of conjugal rights between the parties. The case of the petitioner is that moment his parents returned, the respondent wife left the matrimonial home once again and thereafter till the point of time of filing of the suit in December,1985 there has been no resumption of married life. That the respondent has thus deserted the petitioner after inflicting mental torture.

18.8 In the cross examination of the petitioner the respondent has not been able to establish anything to the contrary. However, in paragraph 17 of the deposition which forms part of the cross examination, the petitioner has stated that when the respondent deserted the matrimonial home in 1983 he had felt that considering the

entire situation it was not possible to stay together due to the behaviour of the respondent. The petitioner further states on 7.1.1987, in the course of cross examination, that his decision which was arrived at in 1987 on tentative basis is confirmed that it is not possible to live together.

19 In paragraph 23, the petitioner has reiterated during cross-examination that the respondent had left matrimonial home only because his parents had returned from pilgrimage and it was incorrect on the part of the respondent to state that there was a quarrel with the respondent and she had been beaten and driven out.

20 The aforesaid deposition of the petitioner gets corroborated from the deposition of Dineshkumar Somabhai Patel at Exh.27. He has specifically referred to his efforts to reconcile the differences between two spouses during their Kashmir trip together. He has also stated that in May 1983, at the behest of the petitioner, he once again tried to patch up the differences between the parties but had failed due to recalcitrant attitude adopted by the respondent.

21 One Premlatta Shantibhai Mehta had deposed at Exhibit 35. She is a neighbour of the petitioner family in Tapovan Society and states that she knows the said family since 1976-77. She has further deposed that right from the time the family of the petitioner came to stay in the society she was a witness to the quarrels between the petitioner and the respondent and she had learnt that the reason for the quarrels was that the respondent wanted to stay separately and the petitioner was not accepting the said demand.

22 The father of the petitioner one Shri Satishchandra Mohanlal Mehta had deposed at Exh.40. It is deposed in paragraph 3 that the respondent wanted to stay separate from the in-laws but she never used to inform this directly and would pester his son i.e. the petitioner on this count. It is further stated that, however, the petitioner being the sole child of his parents the petitioner understood his responsibility and was not inclined to set up a separate unit. It is further deposed that the in-laws suggested that a separate dwelling unit may be setup on the first floor of the house but the said suggestion was not acceptable to the respondent. The said witness has further stated that the behaviour and the conduct of the respondent towards the petitioner was rude and insolent; furthermore, the

petitioner and the respondent used to behave as if they were adversaries and there used to be only bare minimum dialogue between them. This situation was existing even in November,1983 when the parents of the petitioner returned from pilgrimage. It is further deposed that after they returned from pilgrimage, despite the fact that no quarrel had taken place Bharti left the matrimonial home and thereafter has not returned. Even in the cross examination the said witness has reiterated what is stated in the examination in chief, and in general supported the case of the petitioner. In the cross-examination it is further deposed that the respondent was not only not interested in cooking but also did not permit the mother-in-law to cook and hence on a number of times it used to happen that both the petitioner and the respondent would leave home without taking any food. The suggestion that the respondent was not being permitted to enter the kitchen has been denied. It is denied that the respondent was compelled to leave the matrimonial home. It is further stated in the cross examination that the parents were inclined to permit the respondent to come and stay in matrimonial home till November,1983 but on the date of the deposition i.e. 15/7/1987, it is stated that in case the respondent wants to return to the matrimonial home it is for the petitioner to decide whether they would like to stay together or not. However, it is further stated that, as an elder of the family, he would wish that the spouses live together; whether with the parents or separate, subject to the assurance from the respondent that she would not take any untoward step which would put the in-laws in difficulty, because according to him there is every likelihood that the respondent may commit such an untoward act. That in the past she had threatened to either kill her husband or immolate herself.

23 The deposition of the respondent is at Exh.42. She denies that she is rude or insolent or that she does not pay respect to the elders of the family. To the contrary, according to her, the parents in-law used to insult her and caused mental stress. It is denied that she intended to stay separate from the parents in-law, that it was the petitioner who had in fact stated that though the respondent was a good person, if she was not acceptable to his parents, they would stay separate from the parents, and at this stage the mother in-law had stated that she would commit suicide if the son decides to stay separate from the parents. She has further denied that it was not correct to state that she was not interested in staying with the petitioner as husband and wife or cohabit with him. She denies about the tension

between the spouses during the Kashmir trip and the fact that the friend of the petitioner husband viz. Dineshbhai having acted as a mediator between both of them. She has further stated that in May 1977, she was driven out of the house by the father in-law and the house was locked and she was compelled to go to her father's place at Naroda, Ahmedabad. It is further stated that the petitioner was in a pitiable condition because the parents were not ready to permit the respondent to reside at the matrimonial home and the petitioner was not in a position to take any decision, and hence no compromise was possible. It is further deposed that there was no difference of opinion or any illwill between the petitioner and the respondent, but whatever differences were there were due to the parents in-law. It is further stated that during the period 1977-78 when she was at her father's place the baby child had fallen ill, the petitioner had not arranged for any medical treatment, however, it is further stated that the husband was not informed about the illness of the child and hence he could not be blamed. It is denied that she had told the petitioner that the conjugal rights would not be restored till he agrees to stay separate from his parents. However, she states that in 1983 the petitioner had called her for compromise. In the cross examination she states that it is correct that the petitioner husband is not in a position to stay separate from his parents. That whatever differences of opinion are there they came into existence in 1977 between the respondent and her mother in-law. It is further stated that she found difference in the behaviour of in-laws before marriage and after marriage. In paragraph 12 of the deposition in the course of cross examination, it is admitted that she had accompanied her husband for a trip to Kashmir leaving behind her one year old child with her in-laws, because she trusted the parents in-law to take care of the child. She further admits that during the trip to Kashmir on certain days she used to be out of mood and the reason for such moodiness was concern for the health of the child. In paragraph 13, it is stated that in the month of May 1977 no quarrel had taken place in the matrimonial home with anyone and despite that the father in-law had driven her out. She further admits in her cross examination that immediately after the vastupooja her mother in-law had driven her out at around 4.00 p.m. and the petitioner was at home on the said day. However, immediately in the next sentence it is stated that she does not remember at what point of time her mother in-law asked her to leave matrimonial home. She further accepts that after 4.2.1980 she returned to the matrimonial home only in October 1983. That in October 1983, her father

in-law had come to her father's place and invited her to return to matrimonial home and stay with the petitioner, as both father-in-law and mother-in-law were going on pilgrimage. Accordingly, the petitioner had gone to pick her upto bring her to matrimonial home in 1983. It is further accepted that she had gone alone to the matrimonial home leaving behind her son with her parents.

23.1 In paragraph 16 it is stated that in November 1983, when in-laws returned they quarreled with the respondent and after beating her, drove her out of the matrimonial home. However, in paragraph 27 it is stated in no uncertain terms that when she left matrimonial home for the last time in 1983, no quarrel had taken place with anyone. At the end of her deposition, the Court has put to her a specific question as to the reason or the subjects on which there were differences of opinion between the respondent and her in-laws. The reply is to the effect that as they do not want to keep her in the matrimonial home the in-laws used to quarrel even on petty issues. It is further stated that if she used to do the household work the in-laws did not permit her to do so and thereafter informed the petitioner i.e. the husband, that she was not doing any work.

24 The Trial Court has appreciated the aforesaid evidence in detail, however, this Court has also gone into the evidence in depth, and on overall appreciation of the same it is not possible to state that the Trial Court has committed any error in appreciating the evidence. The respondent wife has made various allegations against the parents of the petitioner, but as held by the Trial Court, in the same breath she had also accepted that the in-laws had gone to her father's place to bring her back to the matrimonial home e.g. in March 1977, when the spouses went for Kashmir trip; in 1978, when the mother-in-law went to invite her for Vastu ceremony, thereafter, once again in October 1983 the father-in-law went to invite her and permitted the spouses to live alone so as to enable them to patch up their difficulties and resume cohabitation. It is pertinent to note that in the cross examination the respondent has contradicted herself when she deposes about the reason for her leaving matrimonial home in November,1983. As already stated hereinbefore, at one place she has stated that she was driven out of the matrimonial house and at another place she states that there was no quarrel and despite that she left matrimonial home in November,1983. Therefore, the Trial Court has thought it fit to accept the second version, viz. that there was no quarrel when she left in November

1983; as this is what is stated by the petitioner as well as his father.

25 The Trial Court has also found that the submission made on behalf of the respondent that she was treated cruelly by her in-laws is not only not proved by the respondent, but to the contrary , the evidence goes to show that it was the respondent who had behaved and conducted herself in such a manner that it amounted to cruelty to the petitioner. That the respondent of her own volition, left the matrimonial home on number of occasions even before November 1983 and that there was no resumption of cohabitation between the spouses after 4.2.1980 or atleast after November,1983. It is an admitted position from the evidence on record that the respondent stayed away from the matrimonial home from May 1977 upto December 30,1978 and thereafter from 4.2.1980 to October,1983. As held by the Apex Court, physical relationship between spouses is essential ingredient of valid marriage and in absence of the same it can not be stated that the purpose of the marriage to live together as husband and wife is achieved. The petitioner has specifically stated that though from October to November,1983 the spouses living together under one roof there was no cohabitation between them and this has not been proved to be incorrect.

26 From the deposition of Dinesh it is apparent that the husband was treated in a very curt and rude manner by the respondent wife even in presence of third parties. This would go to show that the petitioner must have been seriously humiliated in presence of others and the Apex Court has held that if a spouse does not extend courteous behaviour to the other member it would be an important factor while deciding upon their claims and counter claims regarding cruelty. That cruelty is an act committed with an intention to cause suffering to the opposite party. (Ref :G.V.N.Kameshwara Rao Vs. G.Jabilli - [2002] 2 SCC 296).

27 The fact that the petitioner husband is the only son and as expected he was not willing to establish a separate residence leaving his aged parents alone is also a relevant factor. The cumulative effect of the circumstances and the conduct of the respondent wife has to be taken onto consideration.(Ref :Adhyatma Bhattar Alwar Vs. Adhyatma Bhattar Sri Devi- AIR 2002 SC 88).

28 Therefore, on an overall consideration of the entire evidence which has come on record, if well established principles are applied to the facts of the

present case, it is apparent that the Trial Court was justified in holding that the petitioner was treated with cruelty by the respondent and further that the respondent deserted the petitioner without any reasonable cause since November,1983 and thereafter has not tried to return to the matrimonial home till date of filing of the petition. It further stands established that the respondent had left the matrimonial home without the consent of the petitioner and against the wish of the petitioner with an intention not to resume cohabitation and as the facts go to show cohabitation has not been resumed. That the respondent had willfully neglected the petitioner and failed in complying with her matrimonial obligations.

29 Before parting note may be taken of the submission made on behalf of the appellant-respondent as regards certain observations of the Trial Court. The Trial Court has observed while appreciating the oral evidence of the father of the petitioner that from his demeanour and the way he appeared before the Court and deposed he seemed to be a straightforward person giving due love and respect to his daughter-in-law and could not have behaved in the manner as alleged by the respondent. Ms.Desai very vehemently objected to the aforesaid observation made by the Trial Court in paragraph 7 of the impugned judgment. It was contended that the Trial Court was in error in giving undue importance to the demeanour of witness. It is necessary to state that the Trial Court is in the best position to appreciate the evidence of a witness deposing before it and for the purpose of appreciating the oral evidence tendered by the witness, an appreciation of the demeanour of the witness, the manner in which the witness deposes, the conduct of the witness are all factors which go into consideration while evaluating the deposition of the said witness. Therefore, it is not possible to accept the sweeping contention made by Ms.Desai in this regard.

30 To summarise :

30.1 For the purpose of ascertaining whether cruelty has been committed in absence of direct evidence, it is necessary to take a total view after considering the various incidents and infer as to whether the petitioner has been treated cruelly by the respondent. As seen hereinbefore, firstly, there is denial of conjugal rights by the respondent from 4.2.1980 till November 1983, when the respondent left the matrimonial home; secondly, insistence by the respondent to separate from the parents and thirdly, the humiliation which was meted out to the

petitioner at the hands of the respondent in presence of outsiders. These factors, alongwith other incidents, would cumulatively go to show that the petitioner was subjected to mental stress/torture which was otherwise not warranted, resulting in frustration and affecting his peace of mind. This would amount to cruelty.

30.2 The concept of condonation also cannot be stated to have been fulfilled in absence of cohabitation between the spouses even when they were living under the same roof.

30.3 As regards the charge of desertion it is apparent that the petiioner has established that desertion was without cause, without consent of the petitioner, against wish of the petitioner and there was wilful neglect of the petitioner by the respondent. There was permanent forsaking or abandonment without reasonable cause. Thereafter the onus which shifted on the respondent to show that leaving of the matrimonial home was with reasonable cause remains undischarged by the respondent.

30.4 Thus, on both the counts viz. cruelty and desertion, the necessary ingredients have been fulfilled and there is no infirmity in the order of the Trial Court.

31. Therefore, this appeal being devoid of merits is required to be dismissed and is accordingly dismissed. The order of the Trial Court holding that marriage between the petitioner and the respondent which was solmenized on 2/2/1975 according to Hindu religious rites stands dissolved is upheld. The decree of divorce to be drawn up accordingly. There shall be no order as to costs.

CIVIL APPLICATION No. 6707 OF 2002.

This Civil Application is filed by the respondent-wife. The Civil Application is nothing else but a form of written submissions along with various pieces of evidence which were exhibited before the Trial Court, and the comments by the applicant on the impugned judgment as well as various depositions of different witnesses.

As the said contentions have already been raised in detail by the learned Advocate for the applicant during course of hearing of the First Appeal, it is not necessary to deal with this Civil Application.

Accordingly this Civil Application is rejected as having become infrutuous.

CIVIL APPLICATION No. 6723 OF 2002.

This Civil Application is filed by the respondent-wife wherein comments have been offered on the deposition of the petitioner husband along with commentary on Section 13 of the Hindu Marriage Act,1955 from a book whose source is not stated.

As the said contentions have already been raised in detail by the learned Advocate for the applicant during the course of hearing of the First Appeal, it is not necessary to deal with this Civil Application. Accordingly this Civil Application is rejected as having become infructuous.

CIVIL APPLICATION No. 6736 OF 2002.

This application is in the form of comments on statement of Shri Satishchandra Mohanlal Mehta, Exh.40 and the same have already been raised in detail by the learned Advocate for the applicant during the course of hearing of the First Appeal, it is not necessary to deal with this Civil Application. Accordingly, this Civil Application is rejected as having become infructuous.

CIVIL APPLICATION No. 7170 OF 2001.

This Civil Application was directed to be heard along with First Appeal No.278 of 1988 vide order dated 17.7.2001 (Coram : M.H.Kadri, J). Accordingly, this application has been heard along with the First Appeal.

As can be seen from the said order dated 17.7.2001 the Court has found that though the appeal was filed as far back as on 14.3.1988 the appellant has been taking various steps to get the hearing of the appeal delayed. In para 3 of the order it is observed by the Court as under :

"It appears that this Civil Application is filed

to get the appeal adjourned on one way or the other. The statements annexed with the application can be taken care of at the time of hearing of the appeal".

In light of the fact that all the contentions raised have already been heard at length while hearing the appeal, it is not necessary to deal with this application independently. Accordingly, this Civil Application stands rejected as having become infructuous by virtue of the final hearing of the appeal.

(D.A.Mehta, J)

m.m.bhatt